No. 332
Consolidated with Nos. 117, 118, 119, 333 and 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

WASHINGTON PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSIONER OF OREGON;
BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA;
STATE BOARD OF EQUALIZATION AND PUBLIC SERVICE COMMISSION OF WYOMING;
STATE OF NEBRASKA and NEBRASKA STATE RAILWAY COMMISSION,

Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR ABOVE NAMED APPELLANTS

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Appendix A—Pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C., §§1, et seq.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado (R. 279) is reported in 131 F. Supp. 372. The report of the Interstate Commerce Commission (R. 57) is found in 287 I. C. C. 611.

JURISDICTION

This action was brought October 22, 1953, in the United States District Court for the District of Colorado (R. 1) by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") against the United States of America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398,

3284 and 2321-2325, to enjoin, annul, suspend and set aside "in part" an alleged "order" issued January 12, 1953, by the Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co. et al." These appellants intervened as defendants in the district court.

The final judgment and decree of the district court, dated February 1, 1955, was entered February 14, 1955. On April 22, 1955, the district court entered an order overruling and denying a motion of these appellants and others for new trial or reargument and reconsideration (R. 361; 362).

Notice of appeal was filed by these appellants in the United States District Court for the District of Colorado on June 20, 1955 (R. 369).

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). Probable jurisdiction was noted by this Court on October 24, 1955.

STATUTES INVOLVED

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out in Appendix A hereto:

> National Transportation Policy (preceding Section 1), and Sections 1(4), 3(4), 15(1), 15(3), 15(4), 15(8) and 20(11).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

I. Does the Rio Grande, which obtained joint through rates on certain commodities under the Commission's

order, have legal standing to seek by a suit to enjoin the order, similar rates on all commodities via all possible routes when the granting of such additional relief is subject to administrative determination of public interest requirements under the Interstate Commerce Act.

II. Did the district court err in holding that Rio Grande sustained "pecuniary injury" and had standing to maintain this action on the ground that the Commission deprived Rio Grande of additional "pecuniary gain" which would be realized if all the joint rates demanded by Rio Grande had been granted.

III. Did the district court err in holding that Rio Grande need not sustain "pecuniary injury" in order to have a "right to judicial review".

IV. Did the district court err in holding that the Commission's finding that "there are at present no through routes, as that term is used in the act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law.

V. Did the district court, in connection with its holding that through routes were in existence on the "bridge" traffic sought by Rio Grande, err in failing to consider and give effect to the fact that the primary objective of Rio Grande was to participate in the transportation of products from the northwest states to the eastern and southern markets and that not a single movement of such "bridge" traffic is shown to have occurred over the Rio Grande route.

VI. Did the district court, in connection with its holding that through routes were in existence, err in

failing to find that the cancellation of joint rates in 1906 and 1912 effectively closed these through routes in accordance with the understanding and "course of business" of the parties concerned and that the conclusion of the Commission in this regard is supported by legislative amendments in 1940 to Section 15(3) of the act.

VII. Did the district court, in connection with its holding that through routes were in existence, err in failing to find as the Commission found, that shippers have a right to route traffic via the Rio Grande and Union Pacific at combination of local rates and that the Union Pacific had no right or duty to refuse shipments.

VIII. Did the district court err in holding that the decision of the Commission as to the existence of through routes "obviously prejudiced the entire proceeding" in view of the fact that the Commission's order established through routes and joint rates upon all commodities that it considered upon the evidence to be necessary in the public interest.

IX. Did the district court err in annulling and setting aside only that portion of the Commission's order which "denied relief to the Rio Grande" upon its holding that the Commission's finding as to through routes "obviously prejudiced the entire proceeding".

X. Did the district court err and exceed its powers in making findings of fact favorable to Rio Grande and in ordering the Commission to proceed "in conformity with the opinion and judgment of the court", and the "instructions" therein.

STATEMENT

The Rio Grande's complaint to the Commission demanded that joint rates, in lieu of the present combination of local rates, be established via its line "the same" as joint rates maintained over shorter through routes by the Union Pacific and other defendant railroads named in the complaint for about 172,000 carloads of traffic moved annually by those railroads. The traffic originates and terminates on the lines of the Union Pacific, Great Northern, Northern Pacific, Milwaukee, Southern Pacific and other railroads that have owned and operated for some 75 years thousands of miles of railroad trackage in the ("northwest") area embracing northern Utah, Idaho, Montana, Oregon and Washington. Most of that traffic originates and terminates on the lines of the Union Pacific[1] and moves over its lines through Idaho, Wyoming, Nebraska and Kansas between points in the northwest area and points in the eastern and southern part of the United States over through routes ("Union Pacific routes") and under joint rates maintained by the Union Pacific and other railroads, including those named above.

The joint rates have never applied via the Rio Grande except during a short period in the early part of this century, when Union Pacific and two of its subsidiary lines were in receiverships. Having their own shorter and direct routes connecting at their eastern termini with other railroads forming the through routes for this transcontinental traffic, the Union Pacific and other carriers

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1 Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consists of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands, and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its line.

serving the northwest area have insisted on retaining their long hauls and therefore have refused to establish through routes and joint rates with the Rio Grande for this transcontinental traffic. The only rates applicable via the Rio Grande for this traffic are the combination or the sum of the local rates of each carrier, and those rates are substantially higher than the joint rates over Union Pacific routes.

Since 1935, the Rio Grande management has sought some method by which it could compel carriers comprising the Union Pacific routes to make their joint rates applicable via its longer and more onerous, mountainous route for a "bridge haul"[2] on traffic from and to the northwest area. (V. I, 48)*. On August 1, 1949, the Rio Grande filed its complaint with the Commission which resulted in the order involved in these appeals. The complaint alleged that the combination of local rates via the Rio Grande for the involved traffic are so much higher than the joint rates maintained via Union Pacific routes as to prevent the movement of the involved traffic via the Rio Grande, thus depriving the Rio Grande of through freight traffic

2 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's president testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates outside of Rio Grande territory. Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

* Because of duplication in page numbering the printed records in these cases, this abbreviation will be used to refer to pages of Volumes I & II, proceedings before the Interstate Commerce Commission.

it might obtain if "equal rates" applied via its line. It alleged that the combination rates were unjust and unreasonable, unduly prejudicial to shippers desiring to use the Rio Grande and that the refusal of the Union Pacific and other defendants named in the complaint to establish joint rates in connection with the Rio Grande the same as the joint rates maintained over Union Pacific routes violated Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act.

The Rio Grande demanded that the Commission order the Union Pacific and other defendants named in the complaint to establish joint rates on *all commodities* in connection with the Rio Grande "the same" as the lower joint rates maintained over Union Pacific routes. Realizing that its demands would short haul the Union Pacific routes 925 miles, Rio Grande's complaint alleged that, as its tracks physically connect with other railroads, through routes "now exist" for the interchange of the involved traffic between its line and the Union Pacific and other railroads and contended that the Commission should prescribe the joint rates without regard to the prohibition in Section 15(4) against short-hauling existing routes. Citing this Court's decision in *Thompson v. United States*, 343 U. S. 549, the Commission rejected that contention and held that prescription of any of the joint rates demanded by Rio Grande would involve the authority conferred by Section 15(3) as limited by Section 15(4) of the Act to prescribe through routes and joint rates.

The order issued by the Commission[3] requires that

3 The validity of the order issued is now before this Court in Nos. 117, 118 and 119, appeals docketed May 31, 1955, from the final decree of the United States District Court for the District of Nebraska.

the Union Pacific and over 200 other railroads establish through routes and joint rates in connection with the Rio Grande "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert over its line, short-hauling the Union Pacific routes at least 925 miles and subjecting the Union Pacific and other lines to large revenue losses.

But the Commission did not order through routes and joint rates on about two-thirds of the traffic, and it is for the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, that the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include the remaining two-thirds of the traffic in the order it issued. Such failure is not embraced in the order issued or in any "order" of the Commission.

The case presents the novel and unique situation of an admitted attempt by the Rio Grande through judicial proceedings to further enhance its financial gains by diverting to its longer line for a "bridge" haul, traffic that originates or terminates on the railroads that have the shortest, fastest and most efficient routes and lowest rates between the points at which the traffic originates and points of its destination.

As stated, the Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line for the traffic it seeks, and that the short-hauling prohibition in Section 15(4) was not applicable. It demanded that the lower joint rates maintained over the existing Union Pacific routes be made applicable via its line, and contended

that refusal of the defendants named in its complaint to make the joint rates applicable via its line discriminated against it. The Commission held that through routes via the Rio Grande did not exist for the involved traffic but found they were necessary in the public interest to provide adequate and more economic transportation for certain commodities named in the order, and required that joint rates "the same" as maintained over existing Union Pacific routes be made applicable via the Rio Grande to those commodities. The Commission found that the evidence failed to prove the alleged discrimination against the Rio Grande and concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained." The order issued does not, in terms, deny or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks by this suit to divert to its line.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to the traffic it seeks to divert to its line for its financial gain, it has no standing to maintain the suit. The court reversed the Commission and held that through routes via the Rio Grande do exist for the involved traffic, that the Commission had erred as a matter of law and upon the evidence in finding that through routes via the Rio Grande did not exist, and that this finding "prejudiced the entire proceeding" before the Commission. The court, again reversing the Commission, held that the evidence proved discrimination against the Rio Grande, and enjoined and annulled "the order" insofar as it denied and withheld relief from the Rio Grande, and "remanded" the case to the Commission for further proceedings in conformity with the court's opin-

ion, but *only* insofar as the Commission "denied and withheld relief" to the Rio Grande.

These five States, representing territory served by long established Union Pacific routes from the Missouri River to the Pacific northwest, oppose Rio Grande proposals to short haul the shortest, swiftest and most economical route to eastern and southern markets, by requiring Union Pacific and over two hundred other railroads to enter into joint through rates with the Rio Grande whose admitted objective is to divert this traffic, primarily from the Union Pacific, in order to obtain a "bridge" haul and thereby improve its financial position. According to Rio Grande the "potential" volume of such traffic moving from the northwest to the east and south, which would be "available for solicitation" and diversion by the Rio Grande to its line amounts to 101,476 carloads annually.[4]

Being distant from the principal markets, the economic life of the northwest depends upon fast, efficient, low cost transportation. Present transportation facilities and routes to and from this area are more than sufficient and Union Pacific alone is shown to possess an unused

4 As indicated in the Commission's report (R. 77, 69) the bulk of the traffic sought constitutes agricultural and mineral products of the northwest, which now travel via Union Pacific "because the Union Pacific routes are shorter." The reverse movement west comprises only 56,286 carloads annually and was given little emphasis by Rio Grande. The only westbound articles included in the order were "granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations" in the northwest (R. 105).

The traffic east and the traffic west are entirely independent of each other and should have been so considered. The Commission's order which the Court annulled in *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 273, involved only the establishment of "through routes for westbound freight traffic."

transportation capacity of 85% (V. I, 690). Piling on additional surplus facilities and unneeded routes, will, in the opinion of these States, adversely affect the economic future of this territory and violate the manifest policy and intention of Congress.[5]

The present through route provisions of the Act were adopted in 1940 in order to make the "shortest, quickest, and cheapest routes available."[6] Union Pacific routes meet these tests. Rio Grande routes do not.

Ordinarily requests for new routes are justified as "needed" and involving "more efficient or more economic" transportation by showing that they are shorter than existing routes. The Rio Grande routes sought herein are unique in that they would short haul the short route by substituting an uneconomic, wasteful, slower route from 219 miles to as much as 50 per cent longer which must go up and down many of the highest mountains in the country.[7]

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5 Congressional policy since 1920 has stressed as paramount economy and efficiency in transportation facilities. *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277. The 1940 declaration of Congress (49 U. S. C. preceding § 1) emphasizes "adequate, economical and efficient service" and this declaration controls the "basic power of the Commission." *American Trucking Assns. v. U. S.*, 344 U. S. 298.

6 Report No. 404, Senate Bill 1261, 75th Cong., 1st Session, page 2. Congressional Record, pp. 6055-6056. 287 I. C. C. 655.

7 The Commission reviews (R. 94) some of the proof showing the Rio Grande to be "less favorably situated," and it finds that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein." (R. 102.) The full impact of wastefulness established beyond dispute by the record is not reflected. This shows that the Rio Grande "has no value as a service route" (V. I, 803); that curvature is so great a train completes a circle

(Continued on next page)

Long experience has demonstrated to these States that the fantastic wastefulness involved in Rio Grande proposals would ultimately be saddled upon the public and shippers of these States.[8] This local marginal mountainous railroad should not be permitted to force its admittance into the transcontinental railroad systems which this region must support.

The overwhelming public detriment that these States and their communities may suffer under Rio Grande proposals includes: (1) reduction in existing service, (2) abandonment of branch lines, (3) waste of present and adequate facilities, (4) increases in unit costs, and (5) destruction of long established channels of trade and commerce.[9]

(Continued from preceding page)

every 5.45 miles and requires 51% more effort (Ex. 12, p. 9), at a cost of $124.33 per car (Ex. 15, p. 7; Ex. 53 p. 3) and that freight car days are wasted.

(Pursuant to stipulation of the parties filed with the Clerk of this Court November 9, 1955, exhibits received in evidence by the Commission and sent up in original form as part of the record prepared by the Clerk of the district court are not printed but may be referred to and treated as if they were printed.)

In *Texas v. United States*, 292 U. S. 522, 530, the Court said it is a "primary aim" of present transportation policy of Congress "to secure the avoidance of waste." One of the long expressed purposes of Congress has been to eliminate this kind of "cut-throat" competition. *United States v. Louisiana*, 290 U. S. 70, 74.

In this connection it is significant that practically all shipper witnesses of Rio Grande, including the U. S. Department of Agriculture, supported their position on the ground that notwithstanding the mandate of Congress against short-hauling existing routes, all gateways should be opened and unlimited circuitous hauling should be the rule.

8 As noted by the Court in *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 270, "when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

9 This Court has said that it "could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing." *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197, 218.

The differences in rates which Rio Grande now experiences merely reflect differences in transportation conditions which have always characterized sound transportation conditions, regulation and practices.[10]

It is clear that what Rio Grande seeks in this proceeding, a rate advantage by circumventing the requirements of the Act, is not appropriate under the Act and is inconsistent with previous decisions of the Commission in this field.[11]

SUMMARY OF ARGUMENT

1. The Commission's order established through routes and joint rates on some commodities. Because of Rio Grande's failure to satisfy various "public interest" requirements, additional commodities and routes were not included in the order. There was no "order" as to omitted routes and commodities. The failure of the Commission to grant a broader "order" affords no jurisdictional basis for judicial review. Granting judicial relief to the Rio Grande in such circumstances would necessarily involve the exercise of "administrative" functions by the Court.

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10 *Barringer & Co. v. U. S.*, 319 U. S. 1, 9. *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 396.
The Act was "not intended to ignore the principle that one can sell at wholesale cheaper than at retail." *Interstate Com. Commiss. v. B. & O. Railroad*, 145 U. S. 263, 276.

11 *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331, 333, summarizes recent Commission decisions and points out that through routes have been established when they "eliminated expensive out-of-line hauls," or were "shorter" or "were at least as economical"; and were rightly denied in the case being heard since the "routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation" and "would not 'give reasonable preference to the originating carrier."

Since the order issued granted Rio Grande substantial benefits and as conceded by the district court "took nothing away from the Rio Grande", no "pecuniary loss" was sustained and Rio Grande has no standing to maintain this action. The lower court clearly erred in concluding that the failure of Rio Grande to realize all the "pecuniary gain" requested constitutes "pecuniary injury". No decision of this Court sustains this position. The only case which the district court cited as supporting this view involved an actual annual loss of $10,000,000, by reason of the Commission's order.

The holding of the district court that "pecuniary injury" need not be suffered, to afford judicial review, would extend the right of review to every litigant before the Commission receiving less than its maximum demands. No precedents can be found which sustain this new rule of judicial review. The cases cited by the district court involve the review of Commission orders denying relief to negroes who were deprived of their Constitutional right to equality of treatment. These cases do not support the conclusion of the court since they involve a "loss" and deprivation of rights constituting legal injury.

The claim now made by Rio Grande that review is justified under the Administrative Procedure Act disregards the language therein continuing the same requirements of legal injury for review as set forth in statutes already providing judicial review.

The position of the Commission that through routes and rates did not previously exist resulted in no prejudice to Rio Grande since the Commission held that the requirements of section 15(4) in this regard were satisfied with respect to the commodities named in the order. The limitation of relief to Rio Grande was caused by

"public interest" requirements under the act and not by the position of the Commission as to non-existence of through routes. The Commission's position in this regard became a moot question by reason of the establishment of through routes.

2. The Commission rightly concluded that through routes did not exist on the basis of the various objective and subjective tests prescribed by this Court. The self styled "brief and sketchy statement of the case", by the distfict court, considered only a portion of the record and some but not all of the controlling factors.

The paramount objective of Rio Grande in this case is to share in the "bridge" shipment of agricultural products from the northwest to the eastern markets. Not a single movement of this "bridge" traffic over any proposed route was shown to have occurred. The relatively few movements shown by Rio Grande for the year 1948 were from east to west, and these, as realistically held by the Commission, amounted to only "isolated" shipments that are wholly insufficient to establish a through route.

There was, therefore, no "holding out", no "course of business", no "course of conduct", no "continuous use", which would establish the desired through routes. Undisputed evidence, given no consideration by the district court, showed that it was only in recent years that Rio Grande completed improvements which enabled it to seek these new routes. Earlier when the routes now desired were closed, Rio Grande confined its efforts to building a new outlet to the Pacific coast. The "pamphlet" campaign launched by Rio Grande at the beginning of this proceeding clearly recognized that the desired routes

were closed. Extensive evidence, unnoted by the court below, refutes the idea there has been any "continuous use" of the proposed through routes. And shipper witnesses for the Rio Grande made no claim that routes already existed. They founded their testimony on the desirability of opening all gateways without regard to the Congressional mandate against short-hauling.

The Commission correctly warned that a decision that Rio Grande's showing herein established the existence of through routes would constitute an "open invitation to any shipper to set aside" the requirements of the act by staging a few shipments.

The district court, though holding that the evidence "establishes the existence of through routes" via the Rio Grande, refused to face squarely the consequences of declaring the existence of "hundreds of thousands of through routes" by the kind of showing attempted and ordered a "new hearing" by the Commission as to the extent of through routes. In so doing the Commission was directed to reconsider a question it has already considered and resolved against Rio Grande.

3. The undisputed evidence shows that joint rates, temporarily in effect while the railroads involved were in receivership, were effectively cancelled by Union Pacific in 1906 and 1912 by tariff amendments. All during the period since this cancellation the public and the parties to this proceeding regarded the routes as closed. Neither the Rio Grande nor anyone else took any action to suspend this closing of routes. Under such circumstances the Commission rightly concluded that Union Pacific had done everything required to close such routes.

In amending Section 15(3) in 1940 Congress recognized the long established right of carriers to close routes by cancelling joint tariff rates. This legislation required a showing of "public interest" if the Commission "suspended" the route closing. The legislative history shows this amendment was aimed at preventing "wholesale cancelling of joint and through routes" by tariff amendments.

The decision of the Commission as to the effect of tariff amendments made more than 40 years ago follows repeated decisions of the Commission and this Court and, being supported by evidence, is not subject to review in this action.

4. The Commission correctly held that shippers have a right to route their traffic and Union Pacific had no right or duty to refuse shipments. There is nothing in the law requiring or permitting a road block or embargo to be erected in order to preserve a carrier's right not to be short-hauled. For many years the Commission and this Court have held that a shipper may route his traffic over a "closed" route if he desires to pay the established rates.

Section 15(8) of the Act is not inconsistent with this position. That section applies only when "two or more through routes" have been established and was added in 1910 to protect shippers against the duplication of routes that might result from an expanded Section 15 adopted in that year. The section has no application in cases such as the present where "two or more through routes" do not exist.

The issuance of a through bill of lading on the few bridge shipments moved west over the proposed route in

1948, merely complied with the mandate of Section 20(11) of the Act and constitutes no acknowledgment of a through route. The Union Pacific, under long established decisions, had no right or duty to refuse a through bill of lading to any such shipper.

5. The district court exceeded its powers and usurped administrative authority in finding that "discrimination" against Rio Grande was established. This finding, and the various "instructions" to the Commission contained in the opinion, have the effect, in connection with the "remanding the case to the Commission", of completely tying the Commission's hands. This action was taken by the district court even though it frankly stated that its disposition of the case was based upon a "narrow ground" following a "very brief and sketchy statement of the case". The opinion of the court constitutes in effect a *de novo* review of the record which is beyond the statutory power of review.

ARGUMENT

I.

Rio Grande Does not Have Legal Standing to Maintain This Action.

The Commission's order establishes through routes via the Rio Grande route in both directions and requires joint rates "the same" as rates on Union Pacific routes to be established on the commodities specified, which comprise about a third of the involved traffic. Rio Grande has therefore obtained under the order substantial rights to solicit and haul transcontinental traffic that it could not previously carry. The potential "pecuniary gain" thus realized by the Rio Grande is considerable (esti-

mated to be $11,000,000, annually although the exact dollar volume is not fixed.

Though holding that the Rio Grande has standing to maintain this suit, the district court admitted that to the extent the Commission's order failed to grant Rio Grande the full "relief" requested it:

> "* * * required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had, and, if considered solely from those points of view, the order caused no pecuniary loss to the Rio Grande." (R. 293-294)

The court goes on, however, and theorizes that *if* Rio Grande was entitled to joint rates under Sections 1(4), 3(4), 15(1) and 15(3) independent of Section 15(4), then it failed in the order to secure "a pecuniary gain to which it was entitled", because the "granting of the relief undoubtedly would have resulted in a large increase of traffic" which in turn would increase "operating income, and, no doubt, in its net earnings." This result, the opinion suggests, may constitute "pecuniary injury to the Rio Grande" (R. 294).

At this point it should be immediately noted that if failure to realize all the "pecuniary gain" requested by any applicant in a proceeding before the Commission may constitute sufficient "pecuniary injury" to obtain a judicial review, then every case in which everything that is requested is not obtained may be the proper subject of judicial proceedings.

It is, of course, elementary that a "pecuniary benefit means an increase in one's net worth by the receipt of money or property." *Hays' Estate v. Commissioner of Internal Revenue* (5th C. C. A.), 181 F. 2d 169, 171.

Practically every complainant before the Commission seeks that kind of "benefit". Heretofore, such a "benefit" or "gain" has not been held identical with a "loss" sustained as a result of a Commission order in determining whether a judicial review was available.

The district court does not refer to a single decision upholding its view that failure to obtain all the "pecuniary gain" asked for may constitute "pecuniary" loss and "legal" injury. The cases involving the problem of legal standing, as we shall see, all relate to the sufficiency of the losses therein experienced to amount to "legal injury". These cases clearly define what kind and type of loss—what deprivation of a previously held benefit—is sufficient basis for judicial review.

The only authority mentioned by the court in support of its theory is the reference in footnote 3 to the *Chicago Junction Case*, 264 U. S. 258, to substantiate the statement that "judicial review" is available where an order will cause a carrier to "suffer pecuniary injury", but that case is no support whatever for the reasoning that the Rio Grande suffered "pecuniary injury" by being deprived of a "pecuniary gain" which "undoubtedly would have resulted" from a "large increase in traffic" if all the relief requested had been obtained.

Instead of supporting the lower court, the *Chicago Junction Case* demonstrates why this action cannot be maintained. The order involved in that case permitted the New York Central to take over certain terminal railroads in Chicago and give the Central a "monopoly", thereby replacing the "neutral control" existing prior to the order. That the plaintiff railroads were actually

deprived of business in an annual amount of $10,000,000 annually, is made clear at pages 266-267 of the opinion.[12]

As further stated by this Court in that case, this "loss" was not merely an "incident of more effective competition". It was "injury inflicted" by "denying" plaintiffs the rights and benefits which they *previously enjoyed*, and an amendment of the Act in 1920 specifically "made provision for securing joint use of terminals."

The Rio Grande can point to no revenue it has lost by the present order. It can only claim that the order *demanded* would give it a "large increase in traffic" and a "pecuniary gain." No authority whatever is cited by the lower court that such demand for additional "pecuniary gain" gives Rio Grande a legal standing in this case.

The opinion below cites several decisions of this Court wherein even a "loss" actually resulting from an order did not give the affected party standing to seek review of the order. Cases such as *Edward Hines Trus-*

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12 The opinion states:

"The main purpose of the acquisition by the New York Central was to secure a larger share of the Chicago business. By means of the preferential position incident to the control of these terminal railroads, it planned to obtain traffic theretofore enjoyed by its competitors. Because such was the purpose of the New York Central control, and would necessarily be its effect, these plaintiffs intervened before the Commission. That their apprehensions were well founded is shown by the results. The plaintiffs are no longer permitted to compete with the New York Central on equal terms. A large volume of traffic has been diverted from their lines to those of the New York Central. The diversion of traffic has already subjected the plaintiffs to irreparable injury. The loss sustained exceeds $10,000,000. Continued control by the New York Central will subject them to an annual loss in net earnings of approximately that amount. If, as suggested in *Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 109, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here."

fees v. U. S., 263 U. S. 143, and *Sprunt & Son v. United States*, 281 U. S. 249, were rejected by the district court as involving a "mere deprivation of a competitive advantage" and therefore "not enough" to warrant review in the courts. The deprivation and loss involved in both of those cases was very substantial[13] but the extent of such loss is not as important as the fact that that loss actually occurred. What the district court overlooked is that notwithstanding such losses this Court held that there was no basis for review because a "legal injury" had not been suffered.

The foregoing observation is also applicable to *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, in which plaintiff a connecting carrier and "minority stockholder" sought to review a Commission order establishing a union station in Cleveland. It was held at page 487 that "legal injury" did not exist although the "financial stability" of the carrier directly concerned was threatened and plaintiff's investment imperiled.

The decisions of this Court sustain the proposition that previously enjoyed rights must be "injuriously affected" in order to afford any standing whatever to seek review of a Commission order.[14]

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13 In the *Hines case* it was claimed property was being taken by the Commission's order "without due process of law, in violation of the 5th Amendment." (263 U. S. p. 147.)

In the *Sprunt case* the order caused a shipper to lose a $7.00 per ton advantage which he had enjoyed over his competitors.

14 *Moffat Tunnel League v. U. S.*, 289 U. S. 113, at page 119, cites and summarizes the cases. See also *Claiborne-Annapolis Ferry v. U. S.*, 285 U. S. 382; *Alton R. Co. v. United States*, 315 U. S. 15.

Alabama Power Co. v. Ickes, 302 U. S. 464, 478, states that the "mere fact that petitioner will sustain financial loss" is not sufficient.

The statement in *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 148, that "plaintiffs have no absolute right" to maintain previous competitive advantages is, *a fortiori*, applicable to Rio Grande and requires a conclusion that Rio Grande has no right of any kind in the additional "pecuniary gain" that would be realized under the order requested of the Commission.

The law that should control here, governing the question of standing to maintain suit to review an order of the Commission was unusually well and correctly stated by Chief Judge Moore of the three-judge court that dismissed for lack of standing the complaint in *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76 (affirmed per curiam by this Court Nov. 14, 1955; No. 400, 76 S. Ct. 152). In that case the order authorized one motor carrier to acquire control of another. Fearing stronger competition from the combination of motor carriers than it had previously experienced, the Santa Fe Railway sued to annul the order. The court stated, page 78, that:

> "In this case the Complaint fails to allege that the plaintiffs have suffered or been threatened with any damage or financial injury. It does not allege that any definite legal right of the plaintiffs has been violated, nor that the order of the Commission has created any additional motor carrier service, or increased competition for the plaintiffs. The plaintiffs merely allege that they are in competition with the motor carriers, and that they have a direct interest in the enforcement of the Interstate Commerce Act and the National Transportation Policy."

Distinguishing this Court's decisions in *Chicago Junction Case*, 264 U. S. 258; *Western Pacific v. South. Pac. Co.*, 284 U. S. 47, and *Alton R. Co. v. United States*, 315 U. S. 15, and noting that the Santa Fe was "not threatened with any new competition from new oper-

ating rights which they have not been subjected to in the past", and, hence, no threatened loss of the railroad traffic from any substantial or material "change in the transportation situation", the court held, at page 79:

> "Thus it appears that there is here no right of the plaintiffs which may have been violated by the order of the Commission and, furthermore, there is no damage alleged. In other situations it has been held that even where there may be damage, a plaintiff must have some special and peculiar interest which may be directly and materially affected by the action alleged to be unlawful. L. Singer & Sons v. Union Pacific R. Co., 311 U. S. 295, 61 S. Ct. 254, 85 L. Ed. 198. And where there is no violation of a right, no action may be maintained and no right exists to be immune from lawful competition or the unauthorized financing of such competition. Alabama Power Co. v. Ickes, 302 U. S. 464, at pages 479-480, 58 S. Ct. 300, 82 L. Ed. 374.
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> "And in Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 59 S. Ct. 366, 369, 83 L. Ed. 543, the Court held one threatened with direct injury by governmental action may not challenge that action 'unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.' There the plaintiffs were held to be without standing to sue because 'the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, * * *.'
>
> "Though the motor carriers in the instant case may, as a combination under joint control with adequate financial backing, offer stronger competition to the railroads than they did previously, we conclude that the railroads have no 'definite legal right' to be immune from this competition and, therefore, are not 'parties in interest' who may maintain this suit."

The District Court Erred in Holding That Rio Grande Need not Sustain Pecuniary Injury to Maintain This Action.

While the precise theory or ground for the court's holding that Rio Grande has standing to maintain this action is uncertain, the emphasis placed on *Mitchell v. United States*, 313 U. S. 80, clearly shows that the court thought that "pecuniary injury" is not "essential to the right to judicial review" as a result of that decision. This Court's holding that Mitchell had a right to review the dismissal of his complaint to the Commission because he was deprived of his *constitutional right* to equal train accommodations, offers no assistance whatever in solving the present case. Here the Rio Grande, in its greatest flights of contention, has never suggested that it is being or has been deprived of any legal or constitutional right by the order of the Commision which it attacks.

This Court said in the *Mitchell* case (p. 94) that the "fundamental individual right" to equality of treatment "guaranteed against state action by the Fourteenth Amendment", prevented compliance with a state statute as to "segregation" of white and colored passengers; and that the provisions of the Interstate Commerce Act carried such guaranty into effect by requiring "equality of treatment".

The entire basis for the proceeding in the *Mitchell* case was the actual deprivation of constitutional rights inflicted upon Mitchell by requiring him to give up a pullman seat and "move into the car provided for colored passengers" and to do this "under threat of arrest"[15] (p. 89).

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15 This Court has made it clear that as to state action, complainants are "deprived of the equal protection of the laws guaranteed by

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Henderson v. United States, 339 U. S. 816, also cited by the lower court, which involved a "denial of dining service" to a colored railroad passenger, is in all respects a holding identical with that in the *Mitchell* case. The action in that case was to review the "railroads current regulations" and "practices", to which complainant had been "subjected" and which deprived him of the "use" of "existing and unoccupied facilities" on trains by reason of his color.

To state, as did the court below, that these constitutional cases do not involve a "pecuniary injury" is but to announce that constitutional rights do not necessarily involve money. It is one thing, however, to suggest actual deprivation of constitutional rights gives a right of review although no "pecuniary" loss has occurred; it is quite another thing to suggest that in cases such as the present, which involve no question of constitutional rights, there may be a review even though there is no "pecuniary injury". If the latter is correct, then what limitation exists on the review of Commission orders? If a plaintiff is entitled to a review because he asked for something he did not receive in full, then the doctrine of "legal injury" as a basis for review is abandoned.

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the Fourteenth Amendment" by racial segregation (*Brown v. Board of Education*, 347 U. S. 483, 495); and such segregation is a "denial of due process of law guaranteed by the Fifth Amendment." (*Bolling v. Sharpe*, 347 U. S. 497, 500). The latter opinion at page 499 cites *Buchanan v. Warley*, 245 U. S. 60, that restrictions on conveyances based on race are an "unreasonable discrimination, a denial of due process of law."

The constitutional basis for a right of action on account of such "deprivation" of rights is unaffected by the fact that a statute may also prohibit the discrimination. *Flemming v. South Carolina Elec. & Gas Co.*, (4 Cir.), 224 F. 2d 752.

Any such result which amounts to judicial review of *all* Commission orders is neither warranted by the statutes nor consistent with judicial practice.

When the entire opinion of the district court is considered, there is reason to believe that the key to its decision is the position taken as to the necessity of "pecuniary injury". The court must have realized, in view of the long history of restrictive decisions in the field of "legal injury" that a failure to obtain all the "pecuniary gain" that was desired could not be converted into a showing of "pecuniary loss".

The conclusion of the district court, that standing exists, will, if affirmed, inevitably change the whole course of decisions in this field and greatly expand the volume of reviewable decisions of the Commission. This will be true if either of the two theories advanced by the court is adopted. We submit, however, that there is no need for enlarging judicial review of such cases to include those which have never heretofore been regarded as cognizable in court. To do so would place this Court in the position of supervising more and more of the intricate activities of the Commission.

The Administrative Procedure Act Provides no Standing for the Rio Grande to Maintain This Suit.

Realizing that long established principles governing judicial review of Commission orders provide no basis for this action, Rio Grande claims the right to maintain this suit under Sections 1009(a) and 1009(e) of the Administrative Procedure Act (5 U. S. C. § 1009).

Section 1009(e) deals only with the "Scope of Review" (60 Stat. 243), which it limits, and does not pur-

port to give any right of review to anyone.[16] That section must therefore be completely eliminated from consideration.

Section 1009(a) with reference to a right of review must be read with the introductory clause which precedes the section.[17] This clause makes directly applicable to the whole of Section 1009(a) all other statutes relating to the Commission, for the purpose of determining to what extent such statutes "preclude" review. The words "so far as" in such introductory clause "recognizes that the previous law often cut off review to some extent without cutting it off altogether" and the Act was "carefully framed" to leave such "law as it was".[18]

The requirement in the Procedure Act of a "legal wrong" as a basis of review continues in effect the same requirement of legal standing that has always existed and which is reflected in the cases reviewed previously in this brief. See also *Alabama Power Co. v. Ickes*, 302 U. S. 464.

The ground for review also specified in the Procedure Act "adversely affected or aggrieved * * * within the meaning of any relevant statute" does not itself establish any new standard for review since reference must be to a "relevant" statute as the basis of review. The "relevant" statutes in this case are the same statutes

16 *E. Brooke Matlack, Inc. v. United States*, 119 F. Supp. 617, 619.

17 Section 1009(a) states: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—(a) Right of Review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

18 Davis, Unreviewable Administrative Action, 15 F. R. D. 411, 428.

that have been in effect for many years prior to the Procedure Act governing review of Commission orders.[19] These statutes and the decisions of the Court interpreting and applying them demonstrate, as shown before, that Rio Grande has no right to a judicial review of this case.

The provisions of Section 1009(a) of the Procedure Act therefore create no new or additional right to judicial review of Commission orders. Moreover, they do not relax the requirements of judicial review which are applicable to review of Commission decisions. That this legislation was never intended to enlarge the power of judicial review as to such orders is shown by the authoritative Attorney General's Manual and his report to the Senate Judiciary Committee in this regard.[20]

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19. These statutes apply to "any order of the Interstate Commerce Commission." 28 U. S. C. 1336, 1398, 2284. 28 U. S. C. Section 2321 commands that the "procedure" in such appeals "shall be as provided in this chapter." 49 U. S. C. 17(9) provides that review may be had of Commission orders under the foregoing "provisions of law" but "not otherwise."

In *Atchison, Topeka and Santa Fe Ry. Co. v. United States, supra,* the district court held at page 78:

"Plaintiffs also refer to Section 10 of the Administrative Procedure Act, 5 U. S. C. A. § 1009, but it is clear that that Act merely was a declaration of existing law where judicial review is provided. See Transamerica Corp. v. McCabe, D. C., 80 F. Supp. 704.

"Thus the decisions under the Interstate Commerce Act must control the determination of whether the plaintiffs are 'parties in interest' within that Act."

20. This Manual states as to Section 1009(a):

"This statement of the persons entitled to judicial review has occasioned considerable comment because of the use of the phrase 'any person suffering legal wrong.' This phrase was used as one of limitation and not for the purpose of making judicial review available to anyone adversely affected by governmental action. The delicate problem of the draftsmen was to identify in general terms the persons who are entitled to judicial review. As so used, 'legal wrong' means such wrong as particular statutes and the courts

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In *Heikkila v. Barber*, 345 U. S. 229, 235, it was held that 'appellant's right to review of deportation orders under the 1917 Act were "not enlarged" by the Procedure Act.[21]

Recent decisions demonstrate that the requirements which have been imposed by this Court under Commission appeal statutes are similar to those imposed by the Administrative Procedure Act.[22]

It has already been noted that a failure to give "pari materia" effect to previous statutes governing review of agency actions will "create confusion" in this

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have recognized as constituting ground for judicial review. 'Adversely affected or aggrieved' has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action. The determination of who is 'adversely affected or aggrieved * * * within the meaning of any relevant statute' has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' Final Report, p. 83; see also pp. 84-85. The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. More specifically he indicated his understanding that section 10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *The Chicago Junction Case*, 264 U. S. 258 (1924); *Sprunt & Son v. U. S.*, 281 U. S. 249 (1930); *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940); and *Federal Communications Commission v. Sanders Brs. Radio Station*, 309 U. S. 470 (1940). Sen. Rep. p. 44 (Sen. Doc. p. 230). This construction of section 10(a) was not questioned or contradicted in the legislative history."

21 The recent decision in *Shaughnessy v. Pedreiro*, 75 S. Ct. 591, as to review of deportation orders was based on 1952 legislation.

22 Compare *Fahey v. O'Melveny & Myers* (9 Cir.), 200 F. 2d 420, 478, with *Benton v. United States* (D. C., Ga.), 114 F. Supp. 37, 44.

field: *Willapoint Oysters v. Ewing* (9 Cir.), 174 F. 2d 676, 686.

There is no Order Which can Serve as a Basis for Review Herein.

The order of the Commission established through routes and joint rates on some of the commodities demanded by Rio Grande. The order is silent as to routes and rates on the remaining commodities which are sought by Rio Grande in this action. At no place in the order is there any reference to the conclusion reached in the report that only a part of the allegations of the complaint are sustained.

The order thus entered by the Commission carries into effect its conclusions as to what should be done. There being no order as to other traffic, no basis whatever exists for a suit by Rio Grande that encompasses and is limited to such other traffic.

The situation in the present case is comparable to *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, affirmed *per curiam, Brady v. United States, et al.*, 283 U. S. 804. Complainant in that case sought reparation damages exceeding $57,000.00 on the ground he was discriminated against by two railroads in the furnishing of cars. The Commission awarded him $12,838.31. He brought suit claiming "errors of law" were made by the Commission in considering the case. Brady conceded in the three-judge district court that he did not want to enjoin the entire order since he received benefits therein. His object, like that of Rio Grande here, was to obtain a review of that portion of the order that did not give him all that he prayed for before the Commission. Under such circumstances it was held that the suit should be

dismissed since the "recitals" in the Commission's report which fixed the amount of recovery were not subject to review. The court held that the "findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument" and that the court has "no power" to review the findings of the Commission "as upon a writ of error or appeal". The "order" which may be reviewed, the Court concludes, is the "mandate" or "command" given by the Commission (p. 850).

In a later suit by the same complainant (*Baltimore & Ohio R. Co. v. Brady*, 288 U. S. 448, 458) this Court stated:

> "Plaintiff may not adopt the award as the basis of his suit and then attack it".

That is precisely what Rio Grande is attempting to do in this case. The only order that can be challenged grants Rio Grande substantial advantages. The present suit makes no attack on this favorable order but misuses such order as a basis for obtaining relief which the Rio Grande "failed to secure from the Commission." *Standard Oil Co. v. United States*, 283 U. S. 235, 241. A long line of decisions of this Court sustain the position that a plaintiff cannot do this. A number of these cases are cited in *Chicago Junction Case*, 264 U. S. 258 at page 264. Judicial review is refused, this Court states, "not because the order * * * was negative in character", but "because to do so would have involved exercise by it of the administrative function of granting the relief", which the Commission had failed to grant. The application of this rule in *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, to the failure of the Commission to fix divisions of joint rates is particularly pertinent.

Citation and discussion by Rio Grande and the district court of *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, and the abolition of the "negative" order doctrine is beside the point. The reason judicial review cannot be had in this case has nothing to do with the negative order question. The fatal defect in this action, namely, the absence of any "order" embracing the matter complained of, is jurisdictional. There must be an order embracing the matter complained of, for, if not, there is nothing to which the Court's jurisdiction and power to review can attach. Courts may not usurp administrative functions by enlarging and expanding orders of administrative agencies.

Any claim by Rio Grande that the decision of the Commission constitutes "merely preparation for possible action in some proceeding which may be instituted in the future" does not provide a foundation for judicial review. *Shannahan v. United States*, 303 U. S. 596, 599.[23] Citing that decision, the opinion in *American Federation of L. v. National Labor R. Board*, 103 F. 2d 933, 936, declares that a decision or determination of an administrative body "may be definitive" and "may be binding as to all parties concerned" and still not constitute an "order" if it "does not also command or direct a particular thing to be done". There is no "command" in the present order with reference to the commodities and routes which are the subject of this suit by Rio Grande.

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23 A number of decisions of this Court are cited in *Carolina Aluminum Co. v. Federal Power Commission* (4 Cir.), 97 F. 2d 435, 436, in support of the rule that a "mere finding upon which no order is based, even though it may determine a status which may form the basis of future governmental action * * * lacks the fundamental characteristics of an order."

United Gas Pipe Line Co. v. Federal Power Commission (3 Cir.), 206 F. 2d 842, 845, observes that—"Time and again, the Supreme Court has cautioned us that reviewability is limited 'to orders of a definitive character dealing with the merits of a proceeding'."

That the recital portion of the order entered herein refers to the report and opinion of the Commission is of no consequence, as noted in the *Brady* and other cases just reviewed. The classic statement in this connection, which appears in a number of the foregoing cases, is the observation of Judge Learned Hand in *Eckerson v. Tanney*, 235 F. 415, 418:

> "* * * the judgment itself does not reside in its recitals, but in the mandatory portions."

The reference in the order of the Commission to the report and its incorporation is in the first paragraph of the order which is entirely devoted to recitals. Following this paragraph appears the first portion of the order beginning *"It is ordered,"*. Thereafter is set forth three "ordering" paragraphs headed, *"It is further ordered"*. There is not the slightest suggestion in the order as thus drawn of any intention on the part of the Commission to make any "command" or to deal with through routes and joint rates on commodities not named in the order. On the contrary, the reference to the report in the recitals and its total omission in the formal "order" constitutes clear indication that the Commission followed the usual rule and practice and had no thought of making the entire report a part of the order.

The present case is therefore subject to the rule stated by this Court in *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 528, that "matter embodied in a report and not followed by a formal order" is not "subject to judicial review".

It is well settled in both federal and state courts that an opinion is "not a part of the record proper" and a statement in an opinion of a conclusion "even though

couched in mandatory terms, cannot serve as the order or judgment of the court".[24]

There was no order of the Commission specifically covering the traffic which is the subject of review in this action. Since such an order "was not in actual existence" at the time the order was entered, there can be no application whatever of the doctrine of incorporation in this case.[25]

The claim by and on behalf of Rio Grande that the negro discrimination cases, *Henderson v. United States*, 339 U. S. 816, and *Mitchell v. United States*, 313 U. S. 80, involved judicial review where no order had been entered by the Commission, is not true. There was an order of dismissal in both of these cases by the Commission which constituted a complete denial of all relief.[26]

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24 *In re D'Arcy*, 3 Cir. 142 F. (2) 313, 315 citing *England v. Gebhardt*, 112 U. S. 502. See also *Wright v. Gibson* (9 Cir.), 128 F. 2d 865. *Dye Coal Co. v. Evatt*, 144 Ohio St. 233, 58 N. E. 2d 653.

25 The principle is illustrated very well in will cases where it is uniformly held that nothing can be incorporated by reference that was not in existence when the will was executed. *Lawless v. Lawless*, 187 Va. 511, 47 S. E. 2d 431. *Continental Illinois Nat. B. & T. Co. v. Art Institute*, 341 Ill. App. 624, 94 N. E. 2d 602.

26 In the *Henderson case* (339 U. S. 816) at page 826, this Court reversed the District Court "with directions to set aside the order of the Interstate Commerce Commission which dismissed the original complaint."

In the *Mitchell* case (313 U. S. 80) at page 88, this Court referred to the fact that the "Commission dismissed the complaint." At page 92 reference is made to the dissent of five Commissioners to this "dismissal." The final paragraph of the opinion (p. 97) remands the case "with directions to set aside the order of the Commission."

Rio Grande was not Prejudiced by the Position of the Commission as to Through Routes.

The Commission held, in disposing of this case, that the requirements of Section 15(4)(b) for adequate and more economic transportation for the articles named in the order were satisfied, and thereupon established through routes and joint rates. In determining the extent of the relief to be granted, the Commission apparently gave consideration to all pertinent provisions of the Act. After referring to Sections 15(3) and 15(4), the Commission said:

> "In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together." (R. 65)

In limiting the scope of the order the Commission gave effect to the evidence concerning public interest and public need in relation to Rio Grande proposals. Had the Commission found the evidence sufficient in these respects and desired to do so, it could have broadened its relief. The position of the Commission, however, as to non-existence of through routes did not operate to prevent its granting further relief to the Rio Grande.

Our contention that Rio Grande was not prejudiced by the position of the Commission as to through routes is demonstrated by the fact that the Commission ordered through routes and joint rates via the Rio Grande for all commodities it deemed necessary in the public in-

terest as shown by the evidence; and by the dissenting opinion of Commissioner Arpaia. He disagreed with the majority and thought the proposd routes were already "open and available to shippers", but he went on to say that no further relief than that granted was appropriate under the record:

> "The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.
>
> "We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires." (R. 111)

The real obstacle to further relief and more "pecuniary gain" in this case was therefore "public interest" and all the requirements in connection therewith. Rio Grande is in no position to complain about the position of the Commission regarding non-existence of through routes under such circumstances.

Since Rio Grande is not "suffering prejudice" as a result of the position of the Commission, there is no right of review. *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 43. This Court does not consider "hypothetical controversies which may never become real". *Electric Bond Co. v. Comm'n*, 303 U. S. 419, 443. It is fundamental that a reviewing court "will disturb the administrative determination only for prejudicial error", and will give no consideration to claimed errors "which did the complaining party no injury".[27]

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27 The cases are collected in 73 C. J. S., Public Administrative Bodies and Procedure, Section 210, pages 569-570. See also *American Power Co. v. S. E. C.*, 325 U. S. 385.

The Administrative Procedure Act (5 U. S. C. § 1009) has been interpreted as requiring "prejudicial error" as a basis for review. *United States v. Watkins* (D. C. N. Y.), 73 F. Supp. 216, 225 (reversed on other grounds 164 F. 2d 457).

In *Philadelphia Co. v. Securities and Exchange Com'n* (C. A. D. C.), 177 F. 2d 720, 725, it was held that an erroneous "standard" would create "no prejudice" if the Commission "did not think petitioners' case proved by any standard however low."

II.

The Commission Carefully Considered the Entire History and Record Herein and Concluded, in Accordance With Decisions of This Court, That Proposed Through Routes do not Exist Because the Carriers in This Proceeding do not "hold Themselves out as Offering Through Transportation Service" in Connection With the Rio Grande From and to the Points Here Concerned as Indicated by Their "Course of Business". The Lower Court, Without Squarely Meeting This Test on the Basis of the Whole Record, Pointed to Some of the Factors Involved and Erroneously Held That Through Routes Exist.

The "first question for our determination", said the Commission (R. 61), "is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15(3) and (4) of the act". Citing and quoting this Court's opinion in *Thompson v. United States*, 343 U. S. 549, the Commission faces squarely the decisive test which must be applied and states:

> "It thus becomes necessary to determine whether the carriers in this proceeding 'hold themselves out

as offering through transportation service' from and to the points here concerned via the Ogden gateway as indicated by their 'course of business' in respect of traffic over the routes in question." (R. 62)

Recognizing that whether through routes exist is not merely a physical, objective inquiry, under the test established by this Court, the Commission properly considers and reviews every feature of the problem including matters that are subjective—questions of holding out, consent, custom and "course of business" by all the carriers involved. In this connection, this Court in the *Thompson* opinion, *supra*, at page 557, quotes a Commission Report to Congress that the "incidents and circumstances" of shipments which are designated for consideration in determining whether a through route exists are "not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments."

Such an inquiry, the Commission realized, must not only consider the entire picture presented; it must also include a realistic appraisal of the evidence giving effect to the realities of the transportation world and the importance and legal recognition of gateways through this vast country.

In limiting its review and consideration to certain factors or incidents bearing on the problem, the lower court did not, in our opinion, grasp the full significance of the standards and considerations implicit in the yardstick established by this Court. Perhaps the lower court spoke with more truth than it realized when it said:

> "This very *brief* and *sketchy* statement of the case will suffice, since we rest our decision upon a *narrow* ground." (Italics added.)

It did not seem to occur to the lower court that the problem in this kind of case cannot be considered in a legal vacuum. Something more than an interplay of abstract definitions and legal rules is required.

The Commission well knew, and it is supremely important to remember, that, as stated in the Commission's report (R. 69), the objective of the Rio Grande was to "participate as a bridge line" on traffic via "its Colorado gateways and Ogden"; and the primary objective, in this connection, as frankly testified by the Rio Grande's President, was to improve its financial position by cutting in on the Union Pacific haul from the northwest states to the eastern portion of the country. This heavy volume of traffic, moving the many products of the northwest to the east, as pointed out by the Commission (R. 77), comprises "101,476" carloads annually. The movement in the reverse direction amounts to only "56,286" cars. The prize therefore which the Rio Grande wanted "available for solicitation" was primarily the eastward movement.

The actual movements, relied on by the Rio Grande to support the existence of through routes, must be considered against the foregoing background. *Significantly, not a single movement occurred within the category of "bridge" shipments from the northwest to the east.* The Commission said:

> "No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points." (R. 63)

There is therefore in this record no eastward movement whatever of the type traffic which constitutes the

basis and backbone of Rio Grande's aspirations. Moreover, the movements going west include only "18 carload shipments". Viewed in the light of the total volume of traffic involved, the Commission was clearly justified in saying that "all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co., supra*, cited with approval by the Supreme Court in *Thompson v. United States, supra*" (R. 64-65).

The figures on movement placed in the record by Rio Grande related solely to the year 1948. While the Rio Grande later claimed this was a representative year, there was no proof whatever that similar shipments occurred in any prior year. We respectfully challenge the statement of the lower court that a "continuous use of the Rio Grande route" (R. 288) is shown by the evidence and the additional statement that such shipments were "substantially the same in years prior to 1948 and continued into 1949" (R. 289). Quite probably these statements were prompted by the language of this Court, based on ample facts, in *U. S. v. Great Northern R. Co.*, 343 U. S. 562, at pages 563-564, that there the "through routes in question already exist since the carriers concerned have continuously provided through service over the same through routes" and the further statement in the same opinion at page 574 that "through routes over the Montana Western and appellee's lines long have been in existence." But the facts here do not justify any such statement.

The Rio Grande's witness who placed this testimony in the record said he selected 1948 because it was the

"last full calendar year prior to this proceeding". He stated that the problem of misrouting traffic existed "to about the same extent in prior years, and have continued thus far in 1949" (V. I, 76). Such testimony does not constitute any showing whatever of any "bridge" movement for any year other than 1948, and the "bridge" movement in that year is confined to 18 isolated westbound shipments over only 18 of the millions of through routes of which the Rio Grande claims to be a part between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area.

We submit that the conclusions of the Commission as to "course of business" and "course of conduct of the Union Pacific" are irrefutably established by the record and that this case must be judged upon the basis that such findings are absolute and conclusive.[28] Positive and unequivocal testimony of other transcontinental lines serving the northwest area, particularly the Northern Pacific, Great Northern and Milwaukee roads (V. I, 711; 909), proves beyond doubt that their policy, "course of business" and "course of conduct", like the Union Pacific's, has always been and now is, as found by the Commission

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28 The Commission said (R. 64):

> "So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, 'the carriers' course of business' has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open

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(R. 64), "to guard jealously its [their] long haul and not open commercially the Rio Grande routes on this traffic."

We further submit that our contention that no "continuous use" of the proposed routes is shown appears from an examination of the events leading up to the filing of this case and the undisputed testimony in this regard. This phase of the record has been entirely ignored by the lower court including the testimony of Rio Grande's President, Wilson McCarthy. He testified unequivocally that the Rio Grande had no idea of ever participating in transcontinental traffic until a long program of modernization was completed which started after the Dotsero cut-off was established in 1934.[29]

It was only after the program detailed in McCarthy's testimony was completed that his company "reached the conclusion" that the Union Pacific should agree to "joint competitive rates" (V. I, 44), and the program appar-

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commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads east-bound, none to destinations east of Colorado common points, and 18 carloads westbound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report."

29 Mr. McCarthy said:

"The Dotsero Cutoff had just been completed when I began my tenure as co-trustee of the Rio Grande. While this 'cutoff' provided a potential means for the Rio Grande to participate in transcontinental traffic, the physical condition of our company at that time was such that we were in no position to effectively compete for this extremely competitive business from either a service or cost standpoint. Because of long depressed earnings, the Rio Grande's

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ently was not completed until 1947 at the conclusion of a reorganization.

The claim of Rio Grande that the proposed routes are already open is to be contrasted with the testimony of McCarthy that he had "been looking forward to the opening of the Ogden Gateway" for many years (V. I, 55); and his statement that it has been "our hope and our thought" that we "ought" not be "excluded" from the northwest business (V. I, 54).

Any suggestion that the through routes in effect temporarily until 1906 or 1912, continued and were the subject of "continuous use" thereafter is therefore simply not true. This further appears from other historical facts in the record. As mentioned by the Commission (R. 68), the "competitive stresses" which occurred in those early years resulted in the Rio Grande financing "the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast.[30]

The inference is inescapable that the Rio Grande was interested in a route to the San Francisco Bay area on the California coast, and the Rio Grande, until it con-

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trackage and rolling stock were in very poor condition. At that time faster schedules were neither feasible nor possible.

"Therefore, a planned program was immediately progressed with a view towards contributing to a sounder national transportation system by making the Rio Grande a vital link in transcontinental traffic. This embraced strengthening of the personnel, a revamping of the financial structure, and complete modernization of the physical plant." (V. I, 42.)

30 As stated by the Commission (R. 68), "[t]he Western Pacific was opened in July 1911." McCarthy, in referring to the construction of the Western Pacific by Rio Grande, says this route is called "the direct *central* continental route" by his company (V. I, 53.)

ceived this case, never had the slightest idea that any through routes to the northwest area could be claimed against the Union Pacific. These historical facts and unequivocal conduct belie any claim that the Union Pacific did not actually close any routes in 1906 or that there has been "continuous use" of them at all times. Certainly no one in the northwest States which have joined in this brief ever had any notice or knowledge of the contention now made by the Rio Grande. If there is such a thing as estoppel in the law of transportation, this would be an appropriate place to invoke it against the Rio Grande.

The first notice the shippers of the northwest had as to the purpose of the Rio Grande was when it launched its "pamphlet" publicity campaign following the institution of this proceeding. This campaign, in which its President McCarthy participated, refutes any suggestion that shippers in the northwest were making "continuous use" of the proposed routes (V. I, 60). As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz" (I. C. C. Ex. 30), in which it posed 20 questions and answered them with the arguments it thought would convince shippers to aid it in its efforts to "open" through routes via its line in connection with the Union Pacific to and from the northwest area. These questions clearly and indisputably show that the Rio Grande itself considered the prior through routes via its line "closed" by the cancellation of the joint rates by the Union Pacific.[31]

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31 Among the 20 questions were the following:
"2 What is Meant by the 'Closed' Gateway at Ogden?"
"3 What is the Effect of the Closed Gateway?"

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Many other items of proof in this record refute the idea that there was any "continuous use" of any of these proposed routes by anyone. The "distributor of farm machinery" whose testimony was dwelled on at considerable length by the Commission (R. 82) in an attempt to justify a portion of the order herein, operated a business that "was established in 1947". The Commission adverted to more *recent* changes in policy relating to the "use of grazing lands in national forests" (R. 84). Such testimony, as well as much other, shows that the claim of Rio Grande was not founded upon any premise that there had been "continuous use" of existing through routes over a long period of time.

The truth is that the testimony of Rio Grande supporters as a whole was premised on the theory that all gateways here and elsewhere should be opened and the Commission should adopt "competition" as the rule of action in such cases without regard to the Congressional mandate against short-hauling existing routes.

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"4 How Does the Rio Grande Seek to Open the Ogden Gateway?"
"5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"
"6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"
"7 Will the Open Ogden Gateway Reduce Freight Rates?"
"8 Will the Open Gateway Provide Improved Service?"
"9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
"11 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
"12 Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
"13 Will Opening of the Ogden Gateway Reduce Railroad employment in the Closed-Door Territory?"
"14 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

We believe that, in view of the admitted design of the Rio Grande for some years to obtain the opening of the Ogden gateway, the caution of the Commission that permitting a showing of a limited number of isolated movements through the gateway would constitute an invitation to circumvent the Act by "staging" a few shipments, deserves careful consideration.[32]

The court's opinion below reflects some misgiving for its general conclusion that the routes claimed are open when it states that such routes are open to and from certain "points" and a "new hearing" will be necessary to determine whether actual movement of all commodities between all points is necessary in order to completely open the gateway. On the question of establishing "hundreds of thousands of through routes" by the process of saying they already exist, the court concludes that this "question was not considered by the Commission, and we do not reach it here" (R. 292).

It is an error to say the Commission did not consider this question. It did consider the question and resolved it against the Rio Grande. The report notes that at least on paper there were in existence certain through routes with joint rates on "east-bound shipments of sheep or goats" (R. 85). Under well established administrative practice and recognizing that the establishment of through routes must have a direct relationship to the channels

32 The Commission said (R. 65):
"Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*"

of commerce, the Commission refused to suggest that all routes were open to all commodities because such routes exist for eastbound sheep and goats.

Completely overlooked by the lower court in this connection, was the holding of this Court in the *Thompson* case that the existence of through routes to points on the Burlington "short of Omaha cannot be used as evidence of the existence of a through route to Omaha." To hold the contrary, that opinion emphasizes, would mean that a railroad would "lose" a "right guaranteed by Section 15(4)" to its long haul (343 U. S. 549, 559).

The statute, as thus declared by this Court, will not permit any railroad to establish through routes by any "foot in the door" process. To the extent that actual movements constitute a "course of business" and a "holding out" by all railroads concerned and to the extent that all other requirements in connection therewith are met, through routes may come into existence, but only to and from those points and covering those specific commodities embraced therein. Any other rule, as this Court notes, would open wide the opportunity of sacrificing a "guaranteed" right against short-hauling.

Before proceeding to a discussion of certain specific points in the lower court's opinion, we wish to comment on its observation that since the "Commission did not invoke its authority under § 15(4)" in promulgating "service orders" during the war for diversion of certain shipments over the Rio Grande "the Commission assumed that through routes were already in existence" (R. 289). This suggestion illustrates quite well how far the court went in its efforts to find support for its position. With the life of the country at stake, with the Com-

mission and the President in full possession of war powers, we are told by the court that the shipment of "troops" and "military supplies" over the Rio Grande route under direct emergency orders of the government constituted a recognition that the routes already existed, otherwise the Commission itself would have had to initiate a proceeding before engaging in such an activity. The statement of the Commission in this regard shows that, in its effort to saddle an "assumption" upon the Commission, the court completely ignored and distorted the effect of the Commission's finding that these "emergency" shipments have "no bearing upon the issue".[33]

In its desperate efforts to escape application of the short-haul prohibition of Section 15(4), the Rio Grande has insisted throughout these proceedings that through routes via its line for the traffic concerned are already "in existence" because counsel and a traffic witness for the Union Pacific stated or "admitted" on the record that it is physically possible for shippers of the involved traffic to use the Rio Grande as a bridge line if they are willing to pay the higher combination of local rates. The district court also seized upon these statements as supporting its conclusion that through routes already exist via the Rio Grande (R. 288). But the same fact was present, and the same "admission" was necessarily made in *Thompson v. United States* 343 U. S. 548, and rejected by the Court as irrelevant to the question whether through routes already existed. At page 558, the Court said:

33. "These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute 'through routes' within the meaning of that term as used in the act." (R. 64.)

"The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under Section 15(3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines."

III.

The Commission Properly Concluded That Cancellation of Joint Rates in 1906 and 1912 Effectively Closed the Rio Grande Routes. This Conclusion Reflected the Understanding of the Parties and the Absence of any Attempt at the Time to Suspend Closing of the Routes. Legislative Amendments of 1940 Confirm the Commission's Conclusion and the Decision of the Commission, in This Regard, is not Subject to Judicial Review.

We submit that the effect of the cancellation by the Union Pacific in 1906 and 1912 of joint rates established while the railroads involved were in control of the receivership court must be judged, now, in the light of what occurred and did not occur at the time and not by any standard of what might have happened in connection with such cancellation.

The evidence establishes beyond dispute and the complaint of Rio Grande before the Commission concedes, (V. I, 7), that at all times since such cancellation, these tariff cancellations operated "to prevent the movement of freight traffic via the routes" sought by Rio Grande, and the action of the Union Pacific and other defendants

deprives "the complainant [Rio Grande] of the use" of these longer routes for the traffic concerned (V. I, 10). In the opinion below the court stated that the "Commission reasoned that the closing of the routes in a commercial sense * * * terminated the through routes". Earlier in the opinion the court says that the "higher rates effectually close the Ogden gateway" (R. 285).

Nowhere does the court suggest what further should have been done by the Union Pacific in 1906 and 1912 to legally close these routes which, by the tariff change, were held to be "effectually" closed. At no place in the opinion is there any reference to any statute, any regulation or any requirement that was not met by the tariff changes. Moreover, from the standpoint of these five States, which all during this period have been led to believe by the action and position of the Rio Grande that the routes were closed, there is no suggestion of what further steps were required to bring about a closing of the Ogden gateway.

The bare assertion of the court (R. 288) that "the through routes were not closed" and that (R. 291) "nothing was ever done to close the routes", under the circumstances, comes as quite a shock in view of the foregoing record as to what transpired in this connection.

In concluding that the routes were actually closed, the Commission gave recognition to the realities of an uninterrupted history showing these "routes are not considered as open" (R. 62) and during all this period the carriers (including the Rio Grande) did not "hold themselves out as offering through transportation service" (R. 62). This being the ultimate and overriding test, and this test being supported by overwhelming proof, the Commission rightly concluded that no mere technical

claim with reference to the sufficiency of a tariff change over forty years ago could be used to affect its conclusion.

But the Commission's reasoning had more than is mentioned in the court's opinion to support it. The Commission knew that neither it nor anyone else had at any time during this long period made any attempt to suspend the "cancellation" of these rates and the closing of these routes; and, until the instant case, no claim had ever been made by anyone that these through routes continued to exist. Ample statutory authority was available to the Rio Grande and anyone wanting to assert the existence of through routes following these tariff changes.

That such a remedy was open is reflected in many decisions of this Court. In *Atlantic Coast Line R. Co. v. U. S.*, 284 U. S. 288, a Commission order was upheld requiring tariff amendments to be cancelled which would have closed a through route. In approving a lease in that case the Commission had imposed as a condition of approval that "existing and possible through routes" would be preserved (page 291). The tariff amendments would have "excluded from the joint rates traffic" over one of such existing through routes (page 291). The opinion concludes that the Commission properly specified that "an open route" should be continued. In reaching the same conclusion the three-judge district court in that case held (48 F. 2d 239), that without the condition inserted in the lease approval there would have occurred an "abandonment of existing routes" (page 242), and that the Commission was within its authority in acting "to prevent the closing of any gateways and routes then existing" (page 244).

The Commission's action in the case cited was upheld under its general suspension authority in Section

15(7).[34] If in the instant case any objection had existed to the cancellation of tariffs and closing of routes by the Union Pacific in 1906 and 1912 it would have been appropriate and the Commission could have acted under the same provision of the Act.[35] No such action having been taken the route became "closed" as suggested in the foregoing case.

In addition to the matters just reviewed, the Commission also realized that in proceeding as it did the Union Pacific followed statutory authority. The recent decision in *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202, gives appropriate effect to the publication of tariff changes as a means of closing a through route. In that case, a shipper routed a shipment of cattle from Montana to Kansas via a route which had no joint through

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34 49 U. S. C. 15(7). Under this section the Commission may on its own initiative or following complaint suspend any new rate or practice affecting any rate, fare or charge.

35 The Rio Grande was fully aware of its right to object to the closing of the through routes, for it vigorously asserted that right, along with the state commissions of Colorado and Idaho, and numerous other protestants against Union Pacific tariffs proposing to "cancel the joint through passenger fares" then in effect with the Rio Grande. *The Ogden Gateway Case*, 35 I. C. C. 131. Approving the cancellation of the joint fares the Commission held, at page 140, that it had "no power * * * to prevent the cancellation of through routes and joint rates" voluntarily established. Pointing out that the Rio Grande routes were longer, more mountainous and had more severe grades than the Union Pacific, the Commission said, at page 141, that to compel the Union Pacific to short-haul itself against its will, through denying approval of the proposed cancellation of the joint and equal fares with the Rio Grande "would be illogical and arbitrary in the highest degree."

Its lack of power to prevent cancellation of the "through routes and joint rates", the Commission said at page 142, would not deprive passengers of "through service" via the Rio Grande at the higher combination of intermediate fares, for no railroad could "deprive passengers of the right to use its rails" at the "regularly established fares."

rates. In dismissing a complaint for reparation, the opinion cites *Thompson v. United States*, 343 U. S. 549, and states:

> "Therein the Supreme Court makes plain that a route such as that used for the instant shipment may not be regarded as a through route under section 15(4) of the Interstate Commerce Act. Thus, the route used by this shipment was a 'closed' route, and the complainant was apprised of that fact by the publication of the joint through rate from and to these points for application over routes other than that used. This does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified, but it does mean that when such routing is specified and complied with, the carriers concerned have a right to charge a combination rate, provided that each of the factors in such combination does not exceed a maximum reasonable rate for a shipment having origin and destination at the points from and to which such rate applies."

There is nothing new or novel in withdrawing from and closing a route by a tariff filing, *The Ogden Gateway Case*, 35 I. C. C. 131. In *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, in upholding the "cancellation of the proposed tariff", which would have closed a through route, this Court observed: "[i]ts proposed tariff was in effect a withdrawal" (p. 775).

This Court has held that Section 6 of the Act expressly provides for the "changing and superseding" of joint through rates by filing of "new schedules" and that any "through bills of lading" thereafter would be subject to "local rates" and not joint rates. *Kansas City So. Ry. v. Albers Comm. Co.*, 223 U. S. 573, 596-597.

Consistent with the Commission decision in the *Steinmetz* case, *supra*, the courts have not hesitated to hold that previous tariffs may be cancelled by implication in order to give full and complete effect to new tariffs.[36]

The position of the lower court as to the effect of the rate cancellation of Union Pacific and the publication of local rates is contrary to the holding of this Court in *Thompson v. United States, supra*, wherein this Court refused to permit circumvention of the Act by any finding that "the sum of the local rate from Lenora to Concordia published by the appellant and the local rate from Concordia to Omaha published by the Burlington" is an "unreasonable" rate for the "route from Lenora to Omaha via the Burlington" (343 U. S. 553). This Court rejected the idea that publication of "local" rates as a part of a "combination" rate constituted the maintenance or existence of a through route. Such a publication, this Court said, "proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines" (343 U. S. 558).

The *Thompson* decision, in reversing the majority opinion of the lower court therein (101 F. Supp. 48), followed the reasoning of Judge Moore, who filed a dissenting opinion. He fully sustained the Missouri Pacific contention that the suggested route was closed by reason of the fact that combination rates "prevented" a movement of grain even though "a shipment of grain

36 In *Chicago, I. & L. Ry. Co. v. International Milling Co.* (C. A. 8), 43 F. 2d 93, 96, it is held that a "new tariff naming different rates" is effective even though it fails to "state in specific terms that the previously established rate is cancelled." To the same effect is *Crookston Milling Co. v. Great Northern Ry. Co.*; 185 Minn. 583, 242 N. W. 287, 289.

could be made at a tariff composed of a combination of the local rates" (p. 51); and the publication of combination rates was the only effective means the Missouri Pacific had of indicating that the route was closed. Judge Moore specifically declared that the "technicality" of a "commercially closed route" should not be used as "evidence of a through route" (p. 55) in view of the requirements of Section 15(4) as to establishing through routes.

Legislative History of Amendments to Section 15(3) Confirms our Position.

In 1940, Congress adopted an amendment to Section 15(3) specifically recognizing the "canceling" of "any through route or joint rate" by "any tariff or schedule" change and providing a standard for suspension thereof by the Commission.[37]

The language of this amendment appears in Senate Report No. 404, 75th Congress (1937), 1st Session (S. 1261), serial #10076 as a clarifying amendment to legislation under consideration.[38]

37 49 U. S. C. 15(3). The amendment consists of a new sentence added thereto which states.

"If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

38 Senate Report 404 states:

"The Committee on Interstate Commerce amended section 1 of the bill by striking therefrom the words: 'The elimination of any existing through route or joint rate, fare, charge, or classification without the consent of all carriers parties thereto or authorization by the Commission shall be deemed prima facie unreasonable and

(Continued on next page)

The purpose of this amendment was spelled out precisely in Senate Report No. 1970, 74th Congress (1936), 2nd Session (S. 1636), serial #9988, as follows:

> "The amendment was adopted to prevent any wholesale cancelling of joint and through routes and rates when the Emergency Transportation Act of 1933 expires on June 16, 1936. In Section 4 of that act there is a proviso:
>
> 'that no routes now existing shall be eliminated except with the consent of all participating lines or upon order of the coordinator.'
>
> "The amendment in the bill under consideration makes this a part of the permanent law, throwing the burden of proof that a route is against the public interest on the trunk line."

The history just reviewed demonstrates clearly that Congress and the Commission recognized that for many years the type of tariff change made by the Union Pacific was effecting a closing of routes and by this amendment a standard was established under which such closing of routes could be suspended. The Congressional purpose and recognition implicit in this legislation is not to be defeated even though the full scope thereof may not have been visible to the Commission in some earlier cases.[39]

(Continued from preceding page)

contrary to the public interest' and inserting in lieu thereof the following: 'If any tariff or schedule cancelling any existing through route or joint rate, fare, charge, or classification without the consent of all carriers parties thereto or authorization by the Commission is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest.

"This amendment by the committee was recommended by Commissioner Eastman and is but clarifying.

39 That the amendment to Section 15(3) in 1940 constituted a recognition that routes become closed by tariff amendments unless "suspended by the Commission" is reflected in *Cancelation of*

(Continued on next page)

The decision in *Virginian Ry. v. United States*, 272 U. S. 658, gives the lower court no support for its views. That case did not involve the closing of routes by tariff changes. It presented the question whether 54 mines on the Virginian railroad were discriminated against by reason of the fact that 45 mines on the same railroad had lower rates that were denied the 54 mines. The dictum in the case as to the existence of through routes with combination rates was irrelevant to the decision. Through routes already were physically open by reason of trackage agreements and reciprocal switching absorptions, and it was wholly unnecessary to consider the requirements of Section 15(4).[40] It was not even necessary to establish joint rates and, as the opinion states, joint rates

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(Continued from preceding page)

Rates and Routes Via Short Lines, 245 I. C. C. 183. While the opinion suggests that in a "strict technical sense" the tariff amendment would not itself effect a complete "closing of the routes", the opinion points out that "for all practical purposes the routes would be closed" and the "interchange of through traffic" would end (p. 185). It was held by the Commission that the last sentence of Section 15(3), added in 1940, gave the Commission authority to suspend "route" cancellations and as "remedial" legislation permitted the Commission to be free from the "limitations contained in section 15(4)" when acting with reference to the *"cancellation* of joint routes and rates already existent" (pp. 187-188).

40 In prescribing through rates for all mines the Commission and the court in the *Virginian* case did not have to face any problem of creating a new through route. *Wyoming Coal Co. v. V. Ry. Co.*, 96 I. C. C. 359, 98 I. C. C. 488. There was no contention whatever even suggested before the Commission that through routes did not already exist. According to Virginian counsel at page 491 existing rates to the west "reach every station," comprise "local distance tariffs" and are not "merely unreasonable rates" but "impossible rates." Applicants asked the Commission for the same "track connections" provided other mines. The complaining mines were "entirely surrounded by mines" enjoying the lower rates and they were the only mines in the entire Outer Crescent District denied the benefit of "district rates to central territory." (p. 491)

The through route contention made in court in the *Virginian* case was purely an "afterthought" and there was no record to support any such argument.

were not required. There was no problem of short-hauling in the *Virginian* case. The considerations which prompted the conclusion in the instant case by the Commission that through routes have not existed for many years were wholly absent from and not involved in the *Virginian* case. We therefore submit that the lower court was not justified in citing that case in support of its conclusion.

The Commission Finding as to Effect of Tariff Filing by Union Pacific is Conclusive.

The matter of when the Union Pacific closed the routes in question and the interpretation and effect of procedural steps in that connection are all matters peculiarly within the jurisdiction and determination of the Commission. On these matters the decision of the Commission will not be reviewed or reversed there being evidence in the record which supports the Commission's findings.

This Court has stated many times that:

> "* * * The Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts. * * *" (*I. C. C. v. Hoboken R. Co.*, 320 U. S. 368.)

The opinion just cited refers, at page 378, to many cases supporting the above rule and it is observed that the courts properly accept the Commission's findings as to "prevailing conditions and practice."

The conclusion of the Commission in the instant case necessarily took into consideration the conditions and practices in 1906 and 1912 concerning the withdrawal from

through routes, and its decision with reference thereto cannot be set aside. As to whether Union Pacific "complied with the procedural requirements of the Act", the "commission's findings of fact" have always been held to be "conclusive" if based on evidence. *B. & O. R. Co. v. United States*, 298 U. S. 349, 364.

The construction by the Commission of the tariff change of the Union Pacific and its holding that the routes proposed herein by Rio Grande are closed, must be adhered to by this Court unless "plainly wrong". *Great Northern Ry. Co. v. Delmar Co.*, 43 F. 2d 780, 782. The record fully sustains the finding of the Commission that through routes claimed by the Rio Grande were not in existence.

IV.

The Commission Correctly Held That Shippers Have the Right to Route Their Own Traffic and Union Pacific had no Right or Duty to Refuse Shipments.

The opinion of the district court falsely assumes that the Union Pacific had the right and duty to refuse a few shipments tendered over the Rio Grande route in order to protect its right not to be short hauled. Pointing to a few shipments that have physically moved via the Rio Grande over portions of a few of the multitude of existing routes, the court concludes that this shows the Rio Grande route is open for the involved traffic.

If the position of the court is correct then a railroad permits at its peril any movement at local or combination rates over a route that it contends is closed. This would require constant policing or a physical separation or disconnection of railroad tracks and a course of conduct wholly foreign to anything found in the statutes or suggested in Commission regulations.

The Commission's opinion makes it clear that no such fantastic requirements exist in the law. Its report emphasized that the "routes used, or attempted to be used" for the few shipments through the gateway were "specified by the shippers"; and none of this traffic was "solicited" by any defendant railroad, the use being confined to times when despite the jealous guarding of its long haul, the Union Pacific has been "called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing" (R. 64).

Both in the foregoing discussion and later the Commission recognizes and gives effect to the "right" of shippers to "route their own traffic."

The position of the court that in failing to defy shippers and maintain a 24-hour vigil at every gateway, the Union Pacific has lost its right to its long haul, is unsupportable in theory and practical operation; and this position of the court is particularly indefensible in the face of the unequivocal declaration of the Commission that it cannot oppose shippers' routing.

Any other view, as pointed out by the Commission, would enable a carrier to completely circumvent the requirements of Section 15(4).[41]

Adhering continuously to this position, the Commission in the recent case of *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202, states that, although the route

41 "Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*" (R. 65.)

chosen there by a shipper was a "closed" route by reason of the "publication" of the carrier, this "does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified." The rate, the opinion holds, for such shipment, would be the "combination rate." And, see *The Ogden Gateway Case*, 35 I. C. C. 131, where the Commission held at page 142, that no carrier may take steps to "deprive passengers of the right to use its rails * * * at the regularly established fares."

On the matter of the duty of a carrier to accept shipments, this Court in *Southern Ry. Co. v. Reid*, 222 U. S. 424, 435, states:

> "It is undoubtedly the duty of a railroad company to receive freight when tendered for transportation."

The opinion goes on to hold, however, that there can be no transportation "until they had fixed and proclaimed the rate to be charged therefor" (p. 442) covering all shippers at all times. The rate established may either be one which is a "through route and joint rate" or if such has not been established, the "separately established rates, fares, and charges applied to the through transportation" (222 U. S. 443-444).[42]

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42 Citing the foregoing case, *Cleveland, C., C. & St. L. Ry. Co. v. Hayes*, 102 N. E. 34, 38, 181 Ind. 87, 97, states:

"If a through rate has not been fixed, then the shipper in exercising his common-law right of routing cannot make a through shipment, but must make shipment according to the local rates of the respective lines over which the carriage may be undertaken."

A number of cases as to the duties and responsibilities of connecting carriers are cited in *N. Y. Central R. Co. v. The Talisman*, 288 U. S. 239, for the following rule:

"Petitioner and respondent were connecting carriers. As such, each, in the discharge of its duties to the public, owed to shippers of freight in its possession destined to points on or routed over the railway of the other the duty to deliver to the connecting line for further transportation; and each was correspondingly bound to receive and carry." (p. 241)

Section 15(8) has no Application.

It is a distortion of Section 15(8) to suggest, as did the lower court, that this section limits the right of shippers to route traffic to cases where a through route exists. Section 15(8) does not purport to cover the myriad of situations where no through route exists. It merely provides that where "two or more through routes and through rates shall have been established", to which the carrier is a party, the shipper may choose between them. It is only in such "cases" that the statute has any application. The rights of shippers where "two" through routes have not been established are not declared or covered by this section.

Section 15(8) was added to the Act in 1910 (36 Stat. 553) as a part of the expansion of Section 15 with reference to the establishment of new through routes. As an accompanying part of such legislation, it was no doubt intended to serve as protection to the shipper in connection with any duplication of routes that would result from such legislation.

The decision in *Lamb v. Moor*, 17 Ga. App. 549, 87 S. E. 837, sustains the above views. The court there held that an interstate shipment was controlled by the Hepburn act, but no designation of routing in writing was necessary to recover since it "nowhere appears that between the point of delivery for shipment and the point of destination two or more through routes and through rates had been established; to which through routes and through rates the defendant was a party" (p. 837).

A recent case, *E. E. West Petroleum Co. v. Atchison, T. & S. F. Ry. Co.* (8 Cir.), 212 F. 2d 812, involving inter-

mediate rates, reviews very well the "intricate system of lines" and "innumerable physical connections" to be found in our railway system (p. 819) and the "practicality" from a commercial standpoint that must govern the application and interpretation of rates. The court discusses the "complexity of our vast railway systems" and the "expert ingenuity in creating imaginary routes" that is possible under the circumstances (p. 820). The court pays heed, at page 816, to the *Thompson* decision of this Court as preventing the declaration of through routes where the carriers' "course of business" negatives their existence since "they never held themselves out as offering such through service."

Where, as Here, Physical Transfer is Possible and Local Rates Have Been Published, no Railroad may Lawfully Refuse to Issue a Through Bill of Lading.

The lower court suggests that when the Union Pacific "issued through bills of lading" it and the other railroads thereby recognize the "through route status" (R. 288) of the proposed Rio Grande route. This suggestion like those previously discussed, contains the fundamental fallacy that Union Pacific had the right and duty to refuse a through bill of lading.

The issuance of bills of lading to shippers at the combination rates could in no manner be given the effect of recognizing a through route within the meaning of Section 15(3) and (4). The Union Pacific or any other railroad was required by statute when "receiving property for transportation from a point in one State * * * to a point in another State" to comply with the mandate that it "shall" issue a bill of lading therefor. 49 U. S. C. 20(11).

Such a bill of lading, under this statute, constitutes a contract and "fixes" the "route" to be used in the transportation. *Schwalb v. Erie R. Co.*, 161 Misc. 743, 293 N. Y. S. 842. It is "required to be issued by the carrier." *Aradalou v. New York, N. H. & H. R. Co.* 225 Mass. 235, 239, 114 N. E. 297, 299. In issuing the bill of lading, the carrier is performing a "duty" imposed upon it by Congress. *Atchison & Topeka Ry. v. Harold*, 241 U. S. 371, 378.

The question whether there is any "holding out" that constitutes a voluntary establishment of through routes is comparable to the question whether, at common law, a railroad "assumed, or held itself out to the public as assuming" the responsibility for carriage over connecting lines. *Insurance Co. v. Railroad Co.*, 104 U. S. 146, 157; 9 Am. Jur. 986. Such an agreement, it was held, will not be inferred and can be shown "only from clear and satisfactory evidence"; and the receipt and acceptance of goods for shipment beyond the carrier's lines did not constitute any such contract. *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 102, 107. Moreover, as held in the case just cited, there was no holding out of such a contract by a statement on the receipt for goods that the receipt might be "exchanged for a through bill of lading" (p. 109). See also *United States v. Munson S. S. Line*, 283 U. S. 43, 47-48.

It is well settled also that the "mere stating of a through fare on the receipt of the freight" did not imply any undertaking for the entire haul. *Northern Pac. Ry. Co. v. Amer. Trading Co.*, 195 U. S. 439, 459.

While the Carmack amendment changed the originating carrier's liability, it made no other change in the

normal or common law relationship of carriers. *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S. 319; 9 Am. Jur. 993. The Carmack amendment applied whether or not the railroad had a "through route or rate established" and irrespective of the carrier's position that even though it "had no through route" it "was bound to accept goods destined beyond its line for delivery to the next carrier, and was required by the statute to give a through bill of lading." *Norfolk & W. Ry. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 595. This opinion by Mr. Justice Holmes refers to the "compulsory acceptance" of shipments in this connection. See also *Mexican Light Co. v. Tex. Mex. R. Co.*, 331 U. S. 731, involving two bills of lading.

V.

The District Court Exceeded its Powers in Making Findings of Fact and Remanding the Case to the Commission With Instructions to Proceed in Conformity With the Opinion.

The opinion of the district court in its specific findings and in its observations and discussion raised many important questions as to the division of authority between administrative commissions and courts.

In "remanding the case to the commission" the court sets forth what it terms "instructions" (R. 362, 293) for the disposition of the matter by the Commission. Included in these "instructions" are the following findings:

> "Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines * * *." (R. 297)

> "Here the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings." (R. 299)

Having given these "instructions" to the Commission and having made these findings, the court concludes:

> "The order in so far as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion." (R. 302)

We submit that if these findings and "instructions" are "appropriate" then the Commission has only a limited function in such cases, and matters of fact which have heretofore been subject to administrative determination may now be foreclosed by judicial action.

It is elementary that the "court must act within the bounds of the statute" permitting judicial review, *Ford Motor Co. v. Labor Board*, 305 U. S. 364, 373. The applicable statute (28 U. S. C. 1336), authorizing a review of the Commission's orders, gives the court power only to "enjoin, set aside, annul or suspend, in whole or in part, any order" of the Commission. There is no authority contained in the statute to "remand" or make findings of fact and there is a complete omission of any power to direct or instruct the Commission as to its further consideration or disposition of the case.

Throughout the opinion, the district court manifests a tendency to tell the Commission how to handle and determine this case. The court even outlines (R. 292) what further consideration should be given to through routes

by the Commission. At no point in the opinion is there any recognition of the limitations of authority involved in judicial review of orders of the Commission.

The opinion of the court points to no evidence justifying its conclusion that "discrimination" against the Rio Grande is established. The Commission, after review of the evidence, holds that discrimination under Section 3(4) is not shown (R. 104) and concludes that the Rio Grande, as a "railroad, could not raise, in its own behalf, an issue under section 3(1)" (R. 65).

While the reasoning of the district court in this regard is not explicit, the opinion states that "a carrier is as fully entitled to non-discriminatory treatment as a shipper" (R. 293). If this statement implies that the Rio Grande has the same rights under Section 3(1) as a shipper, then the court is clearly in error. *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 149. See also *Henderson v. United States*, 339 U. S. 816, 824.

In making its own findings of fact the lower court "usurped an administrative function", *F. P. C. v. Idaho Power Co.*, 344 U. S. 17; and subjects the present case to the following holding in that case at page 20:

> "* * * the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare."

The decision below would effect a "substitution of judicial for administrative discretion", *Communications Comm'n v. WOKO*, 329 U. S. 223, 229, and destroy the "wide discretion" and "wide latitude" which Congress has delegated to the Commission, *Siegel Co. v. Trade Comm'n*, 327 U. S. 608, 611-613.

Quite early in the history of the Commission this Court reflected that the courts should not "usurp merely

administrative functions" under the "guise of exerting judicial power". *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470. More recently in *Federal Comm'n v. Broadcasting Co.*, 309 U. S. 134, 144, this Court has declared:

> "Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."

At page 143 of that decision, this Court emphasizes that it is the responsibility of the Commission "to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest." The finding of the lower court in the present case would dispense with any such functioning by the Commission.

It is not within the province of a court, as stated in *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 276, "to revise the Commission's decision and to enter such judgment as the court may think just". Such an action, this Court declares, constitutes the exercise of "functions which are essentially legislative or administrative" (page 275). See also *United States v. Jones*, 336 U. S. 641, 651, 666, and *Radio Comm. v. General Electric Co.*, 281 U. S. 464. The order sought by Rio Grande herein is of course a rate order and rate orders are "clearly legislative". The *Chicago Junction Case*, 264 U. S. 258, 263.

It is worthy of note that, despite its numerous errors in attempting to sustain the Commission's order "in part", when the three-judge court for the District of Nebraska came to write its final judgment and decree, it recognized these principles and limitations upon the courts in judicially reviewing an administrative order,

as indicated in the following language (page 211, transcript of record from the District of Nebraska, Nos. 117, 118, and 119)—

> "It is further adjudged and decreed that this Court has no power under the Interstate Commerce Commission Act to determine whether it would be in the public interest and consistent with good transportation practices to put into effect only that part of the order of the Interstate Commerce Commission held to be lawful, without regard to and independent of that part of the order held to be unlawful, and, that question being one which should under the law be determined by the Interstate Commerce Commission in the exercise of its informed judgment in its specialized field * * *."

That court "remanded" the case to the Commission for such further proceedings "as the informed judgment of the Commission may dictate", while the three-judge court for the District of Colorado "remanded" the case to the Commission "for further proceedings in conformity with the opinion and judgment of this Court" (R. 362).

Unless the decision of the district court is reversed the way will be open for the Rio Grande to go to the Commission with the "instructions" in the present opinion and insist that an order be made by the Commission that carries into effect all of the orders, observations and declarations of the district court without reference to or consideration of the independent statutory authority and powers of the Commission. Such a course of procedure would do violence to fundamental concepts of separation of powers and administrative law and invite further and unlimited review of all orders entered by the Commission. *Humphrey's Executor v. U. S.*, 295 U. S. 602, 629-630.

CONCLUSION

The judgment and decree should be reversed and the case remanded to the district court with direction to dismiss the complaint.

Respectfully submitted,

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PROOF OF SERVICE

I, BERT L. OVERCASH, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 15th day of March, 1956, I served, on behalf of all appellants herein, copies of the foregoing brief on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

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and with first-class postage prepaid to:

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603 Rio Grande Building
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and with first-class postage prepaid to:

Harry L. Welch, Esq.
730 Farm Credit Building
206 South 19th Street
Omaha 2, Nebraska

5. On Idaho Farm Bureau; Public Service Commission of Utah; Committees of Railroad Brotherhoods who work for The Denver and Rio Grande Western R. R. Co.; National Live Stock Producers Association; Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; West-

ern Forest Industries Association; Koppers Company, Inc.; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc.; and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

Lee J. Quasey, Esq.
139 N. Clark Street
Chicago 2, Illinois

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

and with first-class postage prepaid to:

Ray McGrath, Esq.
First National Bank Building
Omaha, Nebraska

6. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

BERT L. OVERCASH,
Counsel of Record for Appellants Herein,
State Capitol Building,
Lincoln, Nebraska.

APPENDIX A

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(4)—

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to

part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3(4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15(1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers sub-

ject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportaton other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mini-

ma, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

Section 15(4)—

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15(8)—

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however*, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

Section 20(11)—(in part)

"That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, Dis-

trict of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; * * *."